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NO. 84-690

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. 1984

UNITED STATES OF AMERICA, Petitioner

vs.

ROBERT PAUL GAGNON, et al., Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PREFACE

The four Respondents, Storms, Valenzuela, Gagnon and Martin, went to trial on March 24, 1982. On April 1, 1982, after 1½ days of deliberations, the jury found them guilty of conspiracy to possess cocaine with intent to distribute and the alleged substantive counts of possession of cocaine with intent to distribute.

At trial the Respondents were represented as follows:

RESPONDENTS	ATTORNEYS
Donald Storms	Michael L. Piccarreta
Glen Edward Martin	Robert Benedict
Paul Gagnon	Robert S. Wolkin
Pedro Valenzuela	Stephen C. Villarreal

On appeal, Glen Edward Martin was represented by L. Anthony Fines.

At trial, and on appeal, the government was represented by Negatu Molla, Assistant United States Attorney. The Solicitor General's office prepared the Petition for Writ of Certiorari in this matter.

QUESTIONS PRESENTED

1. Whether it was a violation of the Respondents' right to be present at every critical stage of their criminal trial, when the trial court held an *in camera* interview with a juror, during the course of the trial, outside the presence of any of the Respondents and all of their attorneys except Respondent Gagnon's, about the fact that a juror had observed that Respondent Gagnon was sketching portraits of the jury members and feared possible retaliation.

2. If this was a violation of the Respondents' rights, whether it was reversible error because of its prejudicial effect, as the discussion was *never* disclosed to the Resondents and the remaining attorneys, the juror was allowed to remain on the panel and the remainder of the jurors were never questioned as to their ability to remain impartial under the circumstances.

TABLE OF AUTHORITIES

AUTHORITIES:

OTHER:

STATEMENT OF THE CASE

The only issue raised in the government's Petition for Writ of Certiorari in this matter is whether the District Court erred in holding a conference with a juror, during the trial, outside the presence, and without notice to, the Respondents, the Respondents' counsel (except counsel for Respondent Gagnon) and the government's counsel.

The government's Statement of the Case (see Petition, Pages 2-9) is incomplete in that it does not disclose the entire record 1/ relating to this issue and misstates one of the facts. 2/

* * *

1/ Because no record was made of the circumstances surrounding the private in camera interrogation of one juror by the trial court, the record was supplemented on appeal by the Respondents pursuant to Federal Rules of Appeal Procedure, Rule 10(c) by an affidavit of Robert Wolkin, see Appendix A. This supplement have never been contested by the Petitioner and was approved by the court.

The affidavit is therefore part of the record on appeal and is the only portion in the record which relates how the private conference came to exist; nevertheless, the Petitioner did not include nor mention it within its Petition.

2/ On at least three occasions (See, Petition, Pgs. 6, 13 and 14-15) the Petition states that the Respondents and their attorneys had access to transcripts of the conference. This is not accurate. Transcripts were not available until after the trial was completed, a notice of appeal filed, and normal preparation of appellate briefs by the court reporter.

It was the first day of the trial. The jury was empaneled and testimony from some of the government's witnesses had been presented to the jury, and an afternoon recess (see Transcript Vol. 1, Page 177) was taken. Prior to the jury being brought back, the Respondents, their counsel, the counsel for the government and the Court discussed, on the record, several matters, including a motion for a mistrial and some evidentiary issues. (See Transcript Vol. 1, Pages 177-187). Thereafter, the court brought up, almost as an after thought, (see Transcript Vol. 1, Page 187, Lines 9-10) the fact that one of the jurors was concerned that Respondent Gagnon was drawing pictures of the jury members. After a short discussion in the courtroom, outside the presence of the jury, the Court decided she should speak to the juror. The record reflects that the Court interrupted Gagnon's counsel and stated:

> "Court: I will talk to the juror in my chambers and make a determination." (Transcript Vol. 1, Page 189, Lines 11-12)

A recess was then taken. The Court <u>never</u> advised Respondents' counsel when she would speak to the juror. And, in fact, when the

the Court recessed all of the parties, and their counsel, including counsel for the government, retired from the courtroom except for Robert Wolkin who remained in the courtroom.

Thereafter, Wolkin was contacted by the court's bailiff, Joseph Sholder, and was advised that the trial judge required his presence in her chambers. He was not advised as to the nature of the Judge's request and none of the Respondents nor any of the remaining attorneys, including the government's attorney, were advised, or were present when Wolkin was advised the Court was holding a conference at that time. (See Appendix.)

Even though the Court did make a record of the meeting, transcripts were not provided to the Respondents until after the trial was completed and an appeal had been filed. Neither the Respondents, nor the remaining attorneys, were ever asked whether they were "satisfied" that no prejudice would result from the incident. In fact, they were never informed of the juror interrogation, allowed to witness jurors' reactions to the incident, nor to question that juror or any other

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jurors regarding any adverse effect of Gagnon's pencil drawings. [3]

ARGUMENTS

I. PLENARY REVIEW OF THIS CASE IS UNNECESSARY.

A. The Court of Appeals' ruling in this matter involves the application of settled law to an unusual set of facts.

In determining whether to grant a given petition, this Court has always considered of paramount importance whether the decision of the lower court will have a significant impact on future cases. See, Stern and Gressman, Supreme Court Practice, § 4.11, PP. 284-285 (1978). The concept of importance relates to the importance of the issues "to the public as distinguished from" importance to the particular "parties" involved. Layne & Bowler Corp vs. Western Well Works, 261 U.S. 387 (1923); Rice vs. Sioux City Cemetary, 349 U.S. 70, 79, (1955).

The facts which give rise to this case are not facts which would recur to any signi-

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[3] Gagnon was an artist. He was never advised not to draw prior to the trial court's admonishment. After the admonishment, the trial court conviscated the drawings.

ficant extent; therefore a decision by this court, given the peculiar circumstances of this case, will not have any overriding impact on the system.

The law that the Court of Appeals applied in this matter is well settled; [4/] therefore the Court of Appeals merely analyzed the law and applied it to the particular facts of this case. The majority of the Court of Appeals, upon reviewing the record and listening to counsel's arguments, then concluded that under the facts of this particular case, the communication was not harmless beyond a reasonable doubt and that the Respondents had not waived their right to raise this issue at that point in the proceeding. See, United States vs. Gagnon, 721 F.2d 672 (9th Cir., 1983).

On this case, the record reflects that trial court announced that it would speak with a juror and then immediately recessed for the afternoon break. The Court never advised any counsel or party when it would speak to the juror or that it would selectively invite

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4/ "It is well settled that communications between judge and jury in the absence of and without notice to defendant and his counsel are improper." United States vs. Hood, 593 F.2d 293 (8th Cir., 1979).

only Gagnon's counsel to be present. Upon recessing, the parties and their counsel, except Wolkin, retired from the courtroom. While Wolkin was still in the courtroom, the trial court via a handwritten note delivered to Wolkin by the Bailiff, advised him that his presence was required in chambers. Thereafter, a juror was questioned by he Court and Wolkin, outside of the presence of all of the Respondents and the remaining counsel regarding the juror's concerns of possible retaliation by the Respondents. During the questioning, the juror announced that at least one other member of the jury also saw Gagnon sketching. At no time was the second juror even identified, let alone questioned regarding his ability to be impartial under these circumstances. After the recess, the trial court returned to the courtroom and witness testimony was continued. At no time was the Respondents or the other attorneys apprised of the in camera meeting. [5] nor were any precautionary instructions even

* * *

[5] There is nothing in the record to indicate that any of the Respondents or remaining counsel for either side were ever advised of the contents of the in chambers meeting or the possible problems with the other juror.

given to the jury. These facts are so unusual and unique that it is not likely that they will ever be repeated in future trials. Therefore, they do not, as the Petitioner indicates, lend themselves to far-reaching consequences.

B. There is no conflict between the Court of Appeals' decision in this matter and decisions of this Court and other Courts of Appeals.

All of the circuits agree that because such important rights are involved, the defendant's right to be present at every critical stage of his criminal trial, the right to effective assistance of counsel at trial, and the right to be tried by an impartial jury, [See, Federal Rules of Criminal Procedure, Rule 43(a); Rogers vs. United States, 422 U.S. 35 (1975); United States vs. Taylor, 562 F.2d 1345, 1365 (2nd Cir., 1977), cert den., Salley vs. United States, 432 U.S. 909 (1977), Green vs. United States, 434 U.S. 853 (1977), Ramsey vs. United States, 434 U.S. 853 (1977) and Wesley vs. United States, 434 U.S. 853 (1977)], that private communications with a juror by a judge "create a presumption of prejudice." United States vs. Treatman,, 524 F.2d 320, 323 (8th

Cir., 1975); United States vs. Pfingst, 477 F.2d 177, 198 (2d. Cir., 1973), cert den., 412 U.S. 941 (1973); United States vs. Myers,626 F.2d 365 (4th Cir., 1980). However, each case must be evaluated on its own record to determine whether such a presumption "may be overcome by evidence giving a clear indication of lack of prejudice." Rice vs. United States, 356 F.2d 709, 717 (8th Cir., 1966) (footnote omitted); United States vs. Hood, 593 F.2d 293, 298 (8th Cir., 1979).

As this Court opined in its recent decision, Rushen vs. Spain, No. 82-2083 (Dec. 12, 1983),

> ". . . when an ex parte communication relates to some aspect of the trial, the trial judge generally should disclose the communication to counsel for all parties . . . ." (footnote omitted)

That opinion went on to conclude that such a communication between a trial judge and a juror can be harmless error; however, to make that conclusion the individual facts in each case must be reviewed.

The Court of Appeals' decision in this case is not in conflict with Rushen. It reviewed the record and held that under the circumstances of this particular case, they could not "find the error . . . to be

harmless beyond a reasonable doubt."
United States vs. Gagnon, 721 F.2d 672, 678 (9th Cir., 1983).

The opinion below in no way modifies, expands or conflicts with the current status of this legal question. It merely analyzes the unique facts of this case within the boundaries established by this Court and followed by all of the circuits.

In order to consider a conflict between decisions of Courts of Appeals as a reason for granting a petition, this Court ordinarily requires a square and irreconcilable conflict between the lower courts. See, e.g. Avco Corp. vs. Aero Lodge 735, 390 U.S. 557, 559, (1968); North Eastern National Bank vs. U.S., 387 U.S. 213, 217 (1967). It has been suggested that a conflict in decisions between various circuits should be relied upon as a ground for certiorari only in instances where it is clear that the conflict is evident and that it can be effectively resolved only by the prompt action of this court alone. Mr. Justice Harlan,
Some Aspects of the Judicial Process in the Supreme Court of the United States, 33 Australian L.J. 109 (1959).

...

No such irreconcilable conflict exists here, since the Ninth Circuit applied the law as set forth by this Court and followed by the various circuits.

The government, in its Petition (Page 26-28) attempts to create a conflict between this decision and other opinions. The government cites five cases, [6] wherein it alleges a conflict; however in each of those cases defense counsel was present, and either a record was made or notes taken by counsel so that counsel could discuss the matter with their clients. The present case differs in that only one defense counsel [7] was invited to attend, no one else was even informed of the meeting, and even though a record was made, it was essentially unavailable until transcripts were ordered to prepare the appeal; therefore, realistically, in this

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[6] U.S. vs. Brown, 571 F.2d 980, 987 (6th Cir., 1978); Henderson vs. Lane, 613 F.2d 175, 179 (7th Cir.) cert. den. 446 U.S. 986 (1980); U.S. vs. Washington, 705 F.2d 489, 498 (D.C. Cir., 1983); Nevels vs. Parratt, 596 F.2d 344 (8th Cir., 1979); and U.S. vs. Walls, 577 F.2d 690, 697-699 (9th Cir.) cert. den. 439 U.S. 893 (1978).

[7] Further counsel for the principal Defendant Storms was not invited nor was he present when Gagnon's attorney was invited to the in chambers proceeding.

case, objections could not be made in a more timely fashion.

Next, the government refers to three cases wherein there was an absence during a part of each trial, of both defendants and counsel and the decisions held such absence to be harmless. However, in United States vs. Yonn, 702 F.2d 1341, 1344-1345 (11th Cir., 1983), counsel was informed of the in camera interrogation of individual jurors by the trial judge, they objected and the court proceeded. A transcript of the questioning was made and the reviewing court found:

> "In this instance, the record reveals the commendable caution exercised by the trial judge in questioning each juror . . . . There is no suggestion that the judge's communications with, or his questions to the jurors intimidated them or prejudiced the defendants. Moreover, when the trial resumed, the court instructed the jury to disregard their earlier conversation, and again reminded them of their duty to base the verdict only on the evidence, the arguments and the court's instructions."
> United States vs. Yonn, supra, 702 F.2d at 1345.

Yonn differs from the present case because counsel in Yonn was advised of the meeting, a transcript was made, and the court helped to minimize the possibility of prejudice by giving instructions to the jurors both in camera and in the Court, before all

counsel. In the present case, the trial court gave no precautionary instructions, the juror was interviewed regarding only one of the Respondents and the juror's potential prejudice against him, and the interrogation was not complete enough to determine any actual bias against Gagnon or the other Respondents. Further no information was elicited regarding the other juror who had seen Gagnon sketching, nor was the other juror questioned. (Transcript Vol. 1, Page 191, Lines 4-5).

This case also differs from United States vs. Dominquez, 615 F.2d 1093 (1094-1096) (5th Cir., 1980) because Dominquez involved a juror who was excused because his mother became ill. It did not involve any aspect of the case, nor did it relate to the defendant in any way. The Court of Appeals held that it would have been better to have counsel present, but under these facts the Court acted reasonably in dismissing the juror.

In the present matter we have a juror who is fearful of retaliation and at least one other juror who is aware of Gagnon's drawing (and perhaps similarly fearful) but who is never asked about his/her fears or given any precautionary instructions; both jurors

remained on the panel and one of the Respondents was directly involved in the matter causing the possible fear and prejudice.

This decision can also be distinguished from United States vs. Bufalino, 576 F.2d 446, 451 (2d Cir.), cert. den., 439 U.S. 928 (1978), wherein the court was advised that the jurors were quite nervous because a couple of spectators were glaring at them. The trial court discussed the problem with all the attorneys concerned and it was decided that the trial court would interview the jurors in chambers. The Court of Appeals held:

> "Judge Larker's decision to use [this procedure], in response to a request from Sparber's attorney, elicited no objection. Counsel for Jacobs was specifically asked if the voir dire would be acceptable to him, and he voiced no dissent. No timely suggestion was made after all the parties had an opportunity to review the transcripts, that additional questioning with or without counsel present would be desirable." [footnote omitted] . . . given the factors reviewed above, we have no hesitation in rejecting, on waiver grounds, this tardily raised claim." United States vs. Bufalino, supra, 576 F.2d at 451.

The instant case is totally different because counsel never agreed not to be present when the juror interview took place, never had an opportunity to review the record

during the course of the trial, nor to request additional questioning. Moreover, as is more fully explained in the next section, neither the Respondents, nor their counsel, waived their right to be present.

Finally, the government relies extensively on this Court's decision in Rushen vs. Spain, supra; however, Rushen and the present matter are also factually different. Rushen involved a seventeen month trial; there was a post-trial hearing, wherein, the juror involved testified and there was a factual finding that the jury's deliberations were not biased and the defendant was not involved [8]. The matter was before this Court, not on appeal, but on a Writ of Habeas Corpus, wherein the findings of facts by the state's trial and appellate courts deserves a high measure of deference and may be set aside only if it lacks even fair support in

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[8] During the trial a witness referred to an individual, who was a member of the Black Panther party, and serving time for an unrelated murder. One of the jurors knew the victim of that unrelated murder. The alleged murderer never testified; the incident was never mentioned again and it was never insinuated that the defendant was involved in this prior incident. The juror was afraid if the incident was mentioned again, she may lose her composure and cry. The only connection with the defendant was that he was a member of the Black Panther party.

the record. 28 U.S.C.A. § 2254(d). Rushen vs Spain, supra.

In the present case the complaint by the juror directly involved the Respondents, it was not removed from them, there was not a fact-finding hearing, and upon reviewing the record, it can not be established that there was no prejudice beyond a reasonable doubt, which is the standard to be applied. See, Rogers vs. United States, 422 U.S. 35, 38-39 (1975).

II. THE DECISION BY THE NINTH CIRCUIT COURT OF APPEALS IN THIS MATTER WAS CORRECT.

A. A defendant and his counsel in a criminal trial have a right to be present at all critical stages of the trial.

A defendant has a constitutional right [9/] to be present at all stages of his trial when his absence might frustrate the fairness of the proceedings. Faretta vs. California, 422 U.S. 806, 819 n.15 (1975); Illinois vs. Allen, 397 U.S. 337, 338, (1970). In addi-

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9/ "One of the most basic rights guaranteed by the Confrontation Clause is the accused's right to be present in the Courtoom at every stage of his trial." Illinois vs. Allen, supra. See, Dutton vs. Allen, 400 U.S. 74 (1970). (Confrontation and cross examination of adverse witnesses is a fundamental right.) See, also, Badger vs. Cardwell, 587 F.2d 968, 970 (9th Cir. 1978).

tion the Federal Rules of Criminal Procedure, Rule 43, guarantees a defendant the right to be present at every stage of trial in federal cases. [10/] Rogers vs. United States, 422 U.S. 35, 38 (1975); Shields vs. United States, 273 U.S. 583, 588-589 (1927); United States vs. Walls, 577 F.2d 690, 698 (9th Cir.), cert. den., 439 U.S. 893 (1978). Rule 43(a) states that a defendant "shall be present . . ., at every stage of the trial . . ." (emphasis added) except in enumerated instances specifically set forth in the rule.

Cases have also established that communications between the judge and jury are a "critical" stage of a defendant's trial and therefore the defendant has a right to be present during such encounters. Rogers vs. United States, 422 U.S. 35, 39 (1975); Shields vs. United States, 273 U.S. 583, 588-589 (1927).

The right to be present is not merely limited to the defendant, but extends to the defendant's counsel as well. See, Rogers vs. United States, 422 U.S. at 38-39; Polizzi

* * *

10/ A voluntary absence from trial, or an absence due to the defendant's disruptive conduct "after being warned by the Court", does not constitute an abridgement of the right. See, Illinois vs. Allen, supra; Federal Rules of Criminal Procedure, Rule 43.

vs. United States, 550 F.2d 1133, 1137 (9th Cir., 1976); Federal Rules Criminal Procedure, Rule 43; See, also, United States vs. Walls, 577 F.2d 690, 698 (9th Cir., 1978).

This rule, even though secure, is not absolute. Polizzi vs. United States, supra, 550 F.2d at 1137 (9th Cir., 1976). For example, a defendant may not complain of proceedings held while he was voluntarily absent,, Federal Rules of Criminal Procedure, Rule 43(b)(1), or the privilege of presence may be lost by the defendant's misconduct in the courtroom, Illinois vs. Allen, 397 U.S. at 343, or, a defendant can intentionally waive his right to be present under some circumstances. United States vs Bufalino, 576 F.2d at 451.

Finally, a defendant's presence is not required where his presence would be useless or the benefit but a shadow. Synder vs. Massachusetts, 291 U.S. 97, 108 (1934).

In the present matter, the Respondents did not voluntarily absent themselves since they were not given the opportunity to make an informed decision regarding whether they wished to attend. Secondly, the record is devoid of any indication of any misconduct on the part of the Respondents requiring the

court to have them removed from any part of the trial. And, finally, as is set forth in more detail in the next section, the Respondents did not waive their right to be present since they were uninformed of the conferences.

B. The Respondents did not waive their right to be present at the in camera interrogation of a juror since they were never notified of the interview.

This Court has stated:

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights . . . and that we 'do not presume acquiescence in the loss of fundamental rights . . . .' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Johnson vs. Zerbst, 304 U.S. 458, 464 (1938).

In the present case the record does not establish an "intentional relinquishment or abandonment" of the Respondents' right to be present during the interrogation of the juror in question.

The record reflects that out of the presence of the jury several matters were discussed. (Transcript Vol. 1, Pages 177-187.) The court then, at the close of the other matters said:

"Court: I guess we better bring this up in court. One of the jurors indicated to Mr. Sholder that he was - they were concerned - and I don't know which one - that Mr. Gagnon - excuse the pronunciation - was drawing pictures of the jury." (Transcript Vol. 1, Page 198, Lines 9-13).

A short discussion then followed with the court stating:

"Court: I will talk to the juror in my chambers and make a determination." (Transcript Vol. 1, Page 189, Lines 11-12.)

The afternoon recess was then taken and all of the parties and their lawyers, except for Robert Wolkin, retired outside of the courtroom. The Court at no time ever indicated when she would speak to the juror or that she planned to do so without all counsel and Respondents being present.

The court had to send Mr. Sholder, the bailiff, back into the courtroom to obtain Mr. Wolkin's presence in her chambers, thus it would appear that no one, including Petitioner, understood or heard the Court's final comment prior to the recess. The Court could have just as easily invited all counsel back to participate in the interrogation of the juror and could have and should have invited the Respondents as well. (The hearing

could have been held in a closed courtroom in order to protect the rights of everyone involved.)

After the brief closed hearing was completed the court took a recess. (Transcript Vol. 1, Page 192, Line 18) Then the the jury was later brought back and witness testimony was continued.

The court never gave any additional precautionary instructions or advised the remaining counsel or the Respondents what had transpired during the recess. Neither did the Court ever elicit any consent from all of the parties regarding the procedures followed nor determine whether all of the parties were satisfied or even aware of what had transpired.

Since all of the Respondents and their counsel, except for Gagnon's counsel, were unaware of the hearing they could not have objected or requested a copy of the transcript to review to determine whether they were satisfied. Afterall, if trial counsel were to suspect that matters were being handled, outside of their and their clients' presence, a copy of all of the daily transcripts would have to be promptly provided to counsel to assure fairness and this

could result in far reaching and expensive consequences. It cannot even be suggested under the facts herein that counsel and Respondents made a tactical decision not to attend. They were never given the opportunity to make such a decision, a decision which should have been made by them and not the court.

Even under Taylor vs. United States, 414 U.S. 17 (1973), which the government prefers to use over Johnson vs. Zerbst, supra, no waiver occurred because the record does not support a finding of a voluntary absence of the Respondents from this proceeding.

Further, Gagnon should not be treated separately from the remaining Respondents because his lawyer's presence was invited and his lawyer did participate. There are reasons for a defendant to be present, especially if their presence can assist his lawyer and add insight into whether the juror may not be able to be impartial. Minimally, the choice should be left to the defendant as to whether he wants to be present and not made by the court.

It is unreasonable and unfair to suggest that the Respondents had to object to something that they were not aware of, [A

situation different than in Estelle vs. Williams, 425 U.S. 501, 512 (1976) wherein this court held the trial court did not have to ask the defendant whether he wished to be tried in civilian clothes rather than prison garb. It was obvious to all that he was wearing the prision garb], in order to preserve the record.

Furthermore "plain" errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court." Federal Rules of Criminal Procedure, Rule 52(b). Thus, the record does not support the government's contentions that the Respondents waived their right to be present and, since there was no objection on the record to the court proceeding in the Respondents' absence, that they should be precluded from raising the issue on appeal.

C. It was not harmless error to hold such a hearing in the Respondent's absence.

Once it has been determined that a defendant's constitutional right to be present has been violated, his conviction must be reversed unless the government can establish beyond a reasonable doubt, that no prejudice to the defendant resulted. United

States vs. Benavides, 549 F.2d 392, 393 (5th Cir., 1977). United States vs. Myers, 626 F.2d 365, 366 (4th Cir., 1980). If the Appellate Court is unable to determine with certainty, from the record that the lack of presence was harmless, the conviction must be reversed. United States vs. Dellinger, 472 F.2d 340, 380 (7th Cir., 1972); United States vs. Arriagada, 451 F.2d 487, 488 (4th Cir., 1971); United States vs. Click, 463 F.2d 491 (2nd Cir., 1972).

At the in-chambers meeting, the juror, Mr. Graham, indicated that he was fearful of retaliation if a verdict of guilty was returned. (Transcript, Vol. 1, Page 190). He further indicates that he thought that Gagnon's drawings would be used to identify him for retribution purposes after the trial was over. Mr. Graham was suggesting to the court that he had become fearful and possibly prejudiced against the defendants. [11/] The Sixth Amendment right to a trial by jury guarantees to a defendant a fair trial by a

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11/ Only Gagnon was drawing pictures of the jury; however, since the Respondents were all charged with conspiring with each other, the juror may very well have believed that the pictures would be used jointly by all the codefendants in exacting revenge on a jury that convicted them.

panel of impartial, indifferent jurors. Irvin vs. Dowd, 366 U.S. 717, 722 (1961); United States vs. Eubanks, 591 F.2d 513, 516 (9th Cir. 1979); United States vs. Bear Runner, 502 F.2d 908 (8th Cir. 1974). This constitutional right is violated if even one juror is unduly biased or improperly influenced. Eubanks, supra at 517. United States vs. Hendrix, 549 F.2d 1225, 1227 (9th Cir. 1977).

When a juror indicated to the court that he may be unfairly biased against the defendant, the court has a duty to make particular inquiry to determine if actual prejudice exists. United States vs. Corey, 625 F.2d 704, 707 (5th Cir. 1980); United States vs. Nell, 526 F.2d 1223, 1229-30 (5th Cir. 1976); see, Silberthorne vs. United States, 400 F.2d 627, 638-39 (9th Cir. 1968); United States vs. Bear Runner, supra at 912-913, United States vs. Dellinger, supra at 366-67. This duty will not be satisfied by merely asking the juror whether despite the potential for prejudice, he can be fair to both sides. United States vs. Nell, supra at 1230; Silberthorne vs. United States, supra at 638.

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For instance, in Nell, the defendant was charged with embezzling union funds. A perspective juror and the defendant were members of rival unions. Previously, a 500-man riot had occurred during a jurisdictional dispute between the unions. The venireman was also acquainted with the defendant. The court refused to ask any questions which went beyond the venireman's association with the defendant. On various occasions, the venireman stated that he could be fair to the defendant. The defendant was eventually convicted. The Court of Appeals reversed reasoning that the court's general questions as to whether the venireman could be fair did not adequately explore the venireman's potential bias. Id. at 1230.

Similarly, in Silberthorne, supra, the defendant's case was highly publicized. Many of the veniremen had some knowledge of the case. The court, on voir dire, refused to inquire into the particulars of each venireman's knowledge. Rather, the court merely asked whether each venireman could be fair in spite of what he had learned from the pretrial publicity. This court found these questions inadequate and reversed Silberthorne's conviction. This Court of

Appeals reasoned that the questions were faulty on two grounds:

> "(1) The questions propounded by the court to the prospective jurors were calculated to evoke responses which were subjective in nature - the jurors were called upon to assess their own impartiality for the court's benefits, and (2) The entire voir dire examination was too general to adequately probe the prejudice issue. Id. at 638"

The court reasoned further that "merely going through the form of obtaining juror's assurances of impartialty is insufficient to test that impartiality. Id."

Applying these principles to the instant case, the court's questions to Mr. Graham were not sufficient to elicit any actual bias on his part. Like the judge on voir dire in United States vs. Nell, supra, this judge was satisfied with Mr. Graham's bald assertion that he could be fair despite a clear indication by the jury that a potential for bias existed. Further inquiry may have revealed that Mr. Graham was now highly suspicious of Gagnon and his alleged partners in crime. The fact that Mr. Wolkin chose not to probe into Mr. Graham's statement does not mean that the other Respondents' attorneys would not have

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chosen to probe more deeply. [12] Finally, other counsel probably would have inquired as to the name of the other juror who had seen the sketching to determine if he/she too, harbored some bias or fear against the Respondents and to request to examine him/her. Further, no precautionary instructions were requested in an attempt to prevent any prejudice.

Under these circumstances, the government can not sustain its burden of proving, beyond a reasonable doubt, that there was no reasonable possibility of prejudice arising from the fact that the Respondents were not present in chambers. United States vs. Arriagada, United States vs. Benavides, United States vs. Dellinger, and Nevels vs. Parratt, supra.

The Petitioner in its Petition has attempted to meet its burden by arguing that since the trial court and Mr. Wolkin never considered it "necessary or desirable" to question the second juror that it therefore

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[12] The fact that the Respondents cannot now conclusively establish that Mr. Graham was prejudiced is not dispositive. The error here is that the questions put to Mr. Graham were not sufficient to uncover an obvious potential prejudice. See, United States vs. Dellinger, supra at 367.

was of "little importance." (See Petition, Page 14.) That is exactly the point, the interests of the Respondents were not protected at all during this private conference. This second juror should have been questioned and a determination made regarding his/her impartiality.

The government goes on to suggest ". . . that the only purpose of the juror interview was to investigate possible bias against Respondent Gagnon." (Page 15.) However, all of the Respondents were on trial together and charged with conspiracy. Evidence was continually admitted regarding one defendant yet implicating another. Rule 801(d)(2)(E), Federal Rules of Evidence. The questions propounded by the trial court and Mr. Wolkin were insufficient to protect even Gagnon's interests, let alone the remaining Respondents.

It should also be noted when discussing the possibility of prejudice or fear to the Respondents, that this was a closely contested case with lengthy jury deliberations.

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CONCLUSION

The government's Petition for a Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this 27th day of December, 1984.

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